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CASES CITED.

STATUTES.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA, Appellant, *against* NEW YORK COFFEE & SUGAR EXCHANGE, INC., NEW YORK COFFEE & SUGAR CLEARING ASSOCIATION, INC., and others, Appellees.	No. 331.

Appeal from the District Court of the United States for the Southern District of New York.

BRIEF FOR APPELLEES.

(All italics not otherwise indicated are ours.)

Preliminary Statement.

This bill was filed on April 19th, 1923, accompanied by a motion for a preliminary injunction returnable on April 30th. The Attorney General having filed a certificate of expedition, the motion for injunction was argued before the four Circuit Judges of the Second Circuit by the complainant on April 30th and by the defendants on May 7th, and on May 9th the unanimous decision of the Court was rendered, denying the motion for injunction without opinion. A stipulation was

made between the parties that the cause proceed to final hearing upon the merits on the pleadings and affidavits filed upon the application for preliminary injunction, and the Court thereupon on May 15th, 1923, entered its final decree dismissing the petition (R., page 172). No opinion was handed down. The appeal to this Court was entered on May 19th, 1923—one month after the filing of the Bill.

The charge in the Bill is in effect (1) that between February 1st, 1923, and the date of the filing of the Bill, April 19th, 1923, there existed "no economic justification for a sudden or appreciable increase in the price of raw or refined sugar, or for any increase" (R., p. 19), but that nevertheless there was a "rapid increase in the price of raw and refined sugar beginning on February 7, 1923, and in effect on the date of the filing of this bill," and (2) that such rapid increase in price was "the direct result of a combination and conspiracy" between the defendants and their members who "by means of purported purchases and sales of sugar have sought to establish and have established arbitrary and unwarranted prices not governed by the law of supply and demand but based wholly on speculative dealings not involving the delivery of the quantities of sugar represented thereby, but altogether carried on for the purpose and with the effect of unduly enhancing the price of sugar to the enrichment of said defendants and their principals, and to the detriment of the public" (R., p. 21). This is the whole charge.

The only conspiracy or combination or contract to restrain trade, alleged or attempted to be proved by the Government, is to be found in the charter, by-laws, rules and regulations of the Exchange and Clearing Association, and the sales

for future delivery made on the floor of the Exchange by its members in accordance with such rules and in the execution of orders received from twenty (20) or more different countries of the world (R., p. 68).

The defendant Exchange is admittedly organized on substantially similar lines as the Chicago Board of Trade, and bears the same relation to sugar that the Chicago Board of Trade does to grain, with the exception that practically no spot sales or sales for immediate delivery are made on the floor of the Sugar Exchange,—differing in this respect from the Chicago Board of Trade (R., p. 68).

The purposes and usefulness of the New York Coffee and Sugar Exchange, Inc., are set forth in the affidavit of Mr. Diercks, the President of the Exchange, and in the other affidavits submitted on behalf of the defendants (R., p. 67 *et seq.*). Testimony as to the economic usefulness of the Exchange was given by officers of eight (8) great New York banks (R., pp. 89-92, 115). Large producers of cane sugar in Louisiana (Godchaux, R., p. 93) and in Cuba (Cuba Cane Sugar Corporation, R., p. 116), and of beet sugar in California, Colorado and Nebraska (American Beet Sugar Company, R., p. 93) gave similar testimoney, as did some five (5) of the ten American refiners (Godchaux, McCahan, Warner, Savannah, and Imperial, R., pp. 93-94, 117-118).

Briefly, the Exchange, by affording a market for future transactions, under regulations which prevent fraud and unfair dealing, fulfils a great economic function, facilitating the marketing of the sugar crop, keeping the producing and consuming public advised of the trend of world opinion with respect to prices, and thereby preventing the control of prices by a few great refineries,

which with their vast capital might otherwise be able to largely dominate prices, as they notoriously have done in the past.

For a fuller statement of the economic advantages of a future exchange, we refer to Judge Holmes' opinion in the *Christie* case, 198 U. S., 236, hereinafter quoted.

It is of course true that to some extent persons, who have no actual sugar transactions to protect, buy and sell futures on the Exchange; but these transactions are relatively few. While it is not possible for the Exchange to determine the proportionate amount, since it cannot know all the customers of its various members or their reasons for trading on the Exchange, the Government, in the affidavit of Mr. Lewis filed by it (R., pp. 164-168), has undertaken to analyze, from the reports voluntarily furnished it by members of the Exchange, that out of sixty-five per cent. of all transactions on the Exchange in February, dealing with lots of fifty tons each, the following was the distribution of such lots:

Lots Bought		Lots Sold
2,870	Sugar Planters	4,204
175	" Dealers	164
5,747	" Brokers	5,350
1,558	Stock Exchange Brokers & Customers	1,315
3,569	Individual	3,173
5,497	Unknown (a/c reported by number only)	5,381
1,160	Foreign (Eng., France, Ger., Cuba, Can., Spain)	1,446
20,576		21,033

It may fairly be assumed that the gambling element is to be found in the items of "Stock Exchange Brokers and Customers" and "Individual", which is a relatively small portion of the transactions—eliminating those classified as "Unknown", which cannot, of course, be regarded either way. But of those classified under "Stock

Exchange Brokers & Customers" and under "Individual" many are, no doubt, genuine transactions connected with actual sugar contracts—the contracting parties having availed themselves of the private long distance wires of Stock Exchange houses, or their credit account with them, or otherwise.

The Government devotes some twenty-five pages of its brief to an effort to prove that the by-laws and rules of the Exchange are designed to prevent deliveries of sugar through the Exchange, and that the Exchange "was established solely for the purpose of trading or speculating in futures, with no expectation or intention that the contracts entered into on the Exchange should be consummated by a bona fide compliance with their terms." (Government's brief, pp. 24-50). It is sufficient to say that the exact contrary is the fact. Every future contract on the Exchange contemplates and provides for actual delivery, and actual delivery occurs unless the contract is off-set against another contract (R., p. 78, fol. 93). This Court has held that "set-off has all the effects of delivery." (Christie case, 198 U. S., 236, 246).

It is true that deliveries through the Exchange are or may be slightly more expensive than deliveries on the so-called cost and freight method, because deliveries through the Exchange involve the transfer of warehouse receipts, and the charges of the warehouse enhance the cost, while deliveries on the cost and freight method are frequently made without the intervention of a warehouse.

The provisions of the by-laws and rules governing deliveries are designed to ensure proper grading, classification and uniformity, and not to hamper or prevent deliveries, for doing which the

Exchange could have, and has, no motive. It, of course, makes no difference to the Exchange whether contracts are complied with by delivery or by set-off. The Exchange merely provides for fair dealing and uniformity in either case.

POINT I.

The bill set out no case for relief under the statutes invoked.

The suit is predicated wholly upon the Sherman Act and Section 73 of the Wilson Tariff Act. The averments necessary for relief under either statute seem entirely lacking.

1. Section 73 of the Wilson Tariff Act in express terms applies only to those who are "engaged in importing any article from any foreign country into the United States." There is no averment that either of the corporate defendants or any of the individual defendants are engaged in importation.

2. It is elementary that in order to bring any course of conduct within the scope of the Sherman Act there must be (*a*) some concert or agreement among the parties attacked, and (*b*) some actual restraint of trade. The Bill wholly fails to aver either concert or restraint.

(*a*) While the words "combination" and "conspiracy" are freely sprinkled through the Bill, the only averment of substantive fact seems to be that since February 7, 1923,

> "an orgy of speculation in raw sugar has been indulged in through the instrumen-

> tality of the Exchange and Clearing Association" (R., p. 22)

and that

> "these speculative operations carried on for the purpose and with the intent of unduly enhancing the price of both raw and refined sugar, and which have accomplished that object and constitute and are an unlawful combination and conspiracy in restraint of interstate and foreign trade and commerce," etc. (R., p. 24).

There is also a recital (R., p. 21) that

> "This rapid increase in the price of raw and refined sugar, beginning on February 7, 1923, and in effect on the date of the filing of this bill, was and is the direct result of a combination and conspiracy between the New York Coffee and Sugar Exchange (Inc.), the New York Coffee and Sugar Clearing Association (Inc.), and the officers and members of those corporations and their clients or principals who by means of purported purchases and sales of sugar have sought to establish and have established artificial and unwarranted prices not governed by the law of supply and demand, but based wholly on speculative dealings not involving the delivery of the quantities of sugar represented thereby, but altogether carried on for the purpose and with the effect of unduly enhancing the price of sugar to the enrichment of said defendants and their principals and to the detriment of the public."

Giving these averments all the weight which can be claimed for them, how is it possible to tell from them what agreement, if any, there was between the corporate or the individual defendants, and what is the unlawful concert which the Court is asked to dissolve?

It is not easy to see what causal connection there may be between the incorporation of the Sugar Exchange and the Clearing Association in 1885 and 1917, respectively, and the alleged conspiracy beginning on February 7, 1923.

(*b*) The Bill speaks of "fictitious or paper sales" (p. 22), of the establishment of "artificial and unwarranted prices not governed by the law of supply and demand" (p. 21); "abnormal and unwarranted increases in prices of raw and refined sugar" (p. 22), and of "speculative operations carried on for the purpose and with the intent of unduly enhancing the prices of both raw and refined sugar and which have accomplished that object" (p. 24). But one looks in vain for an averment that trade in sugar has been in any way restrained. There is no charge of an effort to corner the market; to control the supply; to prevent or suspend competition among either buyers or sellers; to interfere with the importation, exportation or transportation of sugar, or to fix by arbitrary agreement the price to be paid for it. So far as the Bill shows, there is no self-imposed restraint on the part of the Exchange, the Association and their members, nor any effort on their part to impose any restraint whatever upon third persons. The naked charge is that as a result of what has taken place on the Exchange, the price of sugar has gone up; but this is simply to say that sellers have appeared who are or profess to be willing to give, and buyers who are or profess to be willing to pay more than the Government in its wisdom deems to be a fair price. The head and front of the offending on the part of the Exchange is that it has offered these foolish and misguided persons a theatre in which to display themselves.

That there has been any contract, combination or conspiracy to raise prices, the defendants deny, and the evidence supports them in this denial. The Government, however, reverses the reasoning, and, having established a rise in prices, asks the Court to infer a conspiracy. To this, the answer is obvious.

Mere enhancement of price is not in and of itself a restraint of trade. It frequently follows as a result of some restraint and is therefore to be condemned, but a restraint of trade would be equally vicious if its effect was artificially to reduce rather than raise the price of an article. So far as the Anti-Trust Statute is concerned, the law is perfectly impartial between the producer and the consumer. It is true that one desires a high and the other wishes to pay a low price, but so long as they are left free to contract, it is a matter of no consequence to the law which point of view shall prevail.

It is the constant effort of all producers to get the best price obtainable for the things they produce. They may even indulge in concerted effort to this end, as, for instance, by financing a common advertising campaign to popularize their articles and increase the public demand. What the law denounces is that they should attempt by agreement between themselves to limit the supply or restrict the output, or monopolize the market, or agree upon the prices to be charged. In a free market, all prices depend upon the relative needs of the buyer and seller and upon their opinion of the action which other men in similar circumstances would be willing to take. Giving to the averments of the Bill their most liberal interpretation, all that the defendants have done is to create the impression in

other men's minds that they can if they choose buy or sell sugar for future delivery at certain figures.

Whether the operation of such Exchanges, or the contracts made on them, do or do not have any ultimate effect on interstate commerce is also beside the mark. The Grain Futures Act (*Board of Trade* vs. *Olsen*, April 16, 1923) is predicated on the Congressional declaration that sudden or unreasonable fluctuations in prices on Exchanges "are an obstruction to and a burden upon interstate commerce in grain products and by-products thereof and render regulation imperative for the protection of such commerce and the protection of the national public interest therein." Many things, however, are obstructions or burdens to interstate commerce which do not constitute contracts, combinations or conspiracies in restraint of trade under the Sherman Law. Thus, excessive freight rates are a burden on commerce and as such may be regulated, but in the absence of any agreement among the railroads to make and support them, no one would imagine that excessive freight rates could be cured by an injunction under the Sherman Law, certainly not by enjoining entirely the further operation of the railroads.

The action of Congress in passing the Grain Futures Act is itself evidence both of the Congressional conviction that Exchanges which permit dealings in "futures" perform a useful function, and also that their regulation had not already been committed to the Courts by the Sherman Act, as the Government now asserts.

POINT II.

The bill was properly dismissed as lacking in equity. No facts showing a conspiracy, combination or contract to restrain trade were alleged or proved. The allegations to that effect were mere conclusions.

The Bill alleged, and the proof established:

(*a*) the existence of an Exchange bearing the same relation to sugar that the Chicago Board of Trade bears to grain, except that there are practically no "spot" contracts (contracts for immediate delivery) dealt in on the Sugar Exchange;

(*b*) an enhancement in the price of sugar, both for future delivery and for immediate delivery, during the months of February, March and April, 1923; and

(*c*) an unusually large number of contracts for future delivery made on the floor of the Exchange during such period.

The Bill also alleged, *but this allegation was disproved:*

(*d*) That there existed "no economic justification" for a rise in prices.

The Government, nevertheless, still insists that the advance in prices was due to the unusual number of future contracts made on the Exchange. Proof that this was the cause of the advance is wholly lacking. The report of the Tariff Commission assigns other reasons (R., p. 78, fol. 94). The defendants proved *sufficient economic causes* for the advance in prices. (See Point III post). *The defendants maintain that*

the unusual number of contracts on the Exchange was due to such economic causes. In other words, the Government confuses cause with effect, or puts the cart before the horse.

Assuming for the moment, although the proof points to the contrary conclusion, that the advance in prices was due to the unusual number of contracts made on the Exchange, and even that it was the wish of the defendants that prices should advance, the defendants nevertheless contend that an advance in prices, even if due to speculation in futures on the Exchange, is not a restraint of trade,—in the total absence of any charge or proof of an agreement to fix the prices, to curtail production, to limit sales, to corner the market, to control the supply, to prevent or suspend competition among other buyers or sellers, or interfere with the importation, exportation or transportation of sugar.

In brief, the Sherman Anti-Trust Law does not make mere speculation an offense. It is not an anti-gambling statute. Congress may have power to regulate the Exchange, as it has regulated the Chicago Board of Trade by passing the Grain Futures Act, but this Court is not required to do so by any provision in the Sherman or Wilson Acts invoked by the Government.

All of the acts charged to the defendants in the Bill, apart from the pleader's characterization of them, have been expressly approved by this Court in numerous cases:

Board of Trade of the City of Chicago vs. *Christie Grain & Stock Co.*, 198 U. S., 236;
Clews vs. *Jamieson*, 182 U. S., 461;
Bond vs. *Hume*, 243 U. S., 15.

And by the Court of Appeals of the State of New York:

Springs vs. *James*, 137 App. Div., 110, affirmed, 202 N. Y., 603;
Hurd vs. *Taylor*, 181 N. Y., 231, 233.

The bill characterizes such acts as "fictitious" or "paper" transactions, but this characterization is a mere conclusion of the pleader at variance with the conclusions of this Court. The Bill, having so characterized the lawful acts of the defendants, thereupon charges that they constitute an illegal "conspiracy" or "combination."

In effect the Bill says:

> These defendants have maintained an exchange for future trading where future trading has occurred in considerable volume. Prices have advanced. There is no economic cause for such advance that the pleader knows of, therefore the advance must be due to the exchange's trading.

Or, to put it more briefly:

> Prices are advancing. Trading occurs on the Exchange. Ergo, the Exchange is responsible for advancing prices.

That is all that there is in the Bill in its last analysis.

There is no charge of a corner, or of "wash" selling, or of manipulation, or of any act forbidden, or not distinctly approved, by law.

It is true that in this Court the Government contends that, even though, taken separately, the contracts for future delivery of sugar made on the Exchange are,(as held by this Court in *Clews*

vs. *Jamieson*, 182 U. S., 461) valid, nevertheless, collectively they are invalid since it must be inferred from the small percentage of actual deliveries and the regulations governing deliveries, that the intention to deliver is lacking when the contracts are made. This argument ignores the fact that the same situation existed in the case of *Board of Trade of the City of Chicago* vs. *Chrystie Grain & Stock Company*, 198 U. S., 236, where the validity of such contracts was sustained by this Court, Mr. Justice Holmes saying:

> "Set-off has all the effects of delivery * * *. The fact that contracts are satisfied in this way by set-off and the payment of differences detracts in no degree from the good- of the parties, and if the parties know when they make such contracts that they are very likely to have a chance to satisfy them in that way and intend to make use of it, that fact is perfectly consistent with a serious business purpose and an intent that the contract shall mean what it says * * *. It is none the less a serious business contract for a legitimate and useful purpose if it may be off-set before the time of delivery in case delivery should not be needed or desired."

The defendants' proof shows that the transactions on the Exchange are substantially similar to those on the Chicago Board of Trade, and on the New York Cotton Exchange, which have been judicially approved in the following cases among others.

Board of Trade of City of Chicago vs. *Christie Grain & Stock Co.*, 198 U. S., 236, 246. This was a suit brought to enjoin the use of the plaintiff's quotations by an alleged bucket shop. The de-

fense that the plaintiff's own transactions were illegal was overruled. By HOLMES, *J.* (italics ours):

> "It appears that in not less than three-quarters of the transactions in the grain pit there is no physical handing over of any grain, but that there is a settlement, either by the direct method, so-called, or by what is known as ringing up. The direct method consists simply in setting off contracts to buy wheat of a certain amount at a certain time, against contracts to sell a like amount at the same time, and paying the difference of price in cash, at the end of the business day. The ring settlement is reached by a comparison of books among the clerks of the members buying and selling in the pit, and picking out a series of transactions which begins and ends with dealings which can be set against each other by eliminating those between—as, if A has sold to B five thousand bushels of May wheat, and B has sold the same amount to C, and C to D and D to A. Substituting D for B by novation, A's sale can be set against his purchase, on simply paying the difference in price. The Circuit Court of Appeals for the Eighth Circuit took the defendant's view of these facts and ordered the bill to be dismissed. 125 Fed. Rep., 161. The Circuit Court of Appeals for the Seventh Circuit declined to follow this decision and granted an injunction as prayed. 130 Fed. Rep., 507. Thereupon writs of certiorari were granted by this Court and both cases are here.
>
> "As has appeared, the plaintiff's chamber of commerce is, in the first place, a great market, where, through its eighteen hundred members, is transacted a large part of the grain and provision business of the world. *Of course, in a modern market contracts are not confined to sales for immediate delivery. People will endeavor*

to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices and providing for periods of want. It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But legislatures and courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain. This Court has upheld sales of stock for future delivery and the substitution of parties provided for by the rules of the Chicago Stock Exchange. *Clews* vs. *Jamieson*, 182 U. S., 461.

"When the Chicago Board of Trade was incorporated we cannot doubt that it was expected to afford a market for future as well as present sales, with the necessary incidents of such a market, and while the State of Illinois allows that charter to stand, we cannot believe that the pits, merely as places where future sales are made, are forbidden by the law. But again, the contracts made in the pits are contracts between the members. We must suppose that from the beginning as now, if a member had a contract with another member to buy a certain amount of wheat at a certain time and another to sell the same amount at the same time, it would be deemed unnecessary to exchange warehouse receipts. We must suppose that then as now, a settlement would be made by the payment of differences, after the analogy of a clearing house. This naturally would

take place no less that the contracts were made in good faith for actual delivery, since the result of actual delivery would be to leave the parties just where they were before. Set-off has all the effects of delivery. The ring settlement is simply a more complex case of the same kind. These settlements would be frequent, as the number of persons buying and selling was comparatively small.

"The fact that contracts are satisfied in this way by set-off and the payment of differences detracts in no degree from the good faith of the parties, and if the parties know when they make such contracts that they are very likely to have a chance to satisfy them in that way and intend to make use of it, that fact is perfectly consistent with a serious business purpose and an intent that the contract shall mean what it says. There is no doubt, from the rules of the Board of Trade or the evidence, that the contracts made between the members are intended and supposed to be binding in manner and form as they are made. There is no doubt that a large part of those contracts is made for serious business purposes. Hedging, for instance, as it is called, is a means by which collectors and exporters of grain or other products, and manufacturers who make contracts in advance for the sale of their goods, secure themselves against the fluctuations of the market by counter contracts for the purchase or sale, as the case may be, of an equal quantity of the product, or of the material of manufacture. It is none the less a serious business contract for a legitimate and useful purpose that it may be offset before the time of delivery in case delivery should not be needed or desired."

Spring vs. *James*, 137 App. Div., 110, affd.,

202 N. Y., 603, was a suit to recover a broker's commissions on transactions in futures on the New York Cotton Exchange. By CLARKE, *J.*, at page 112:

> "The New York Cotton Exchange was incorporated by a special act of the New York Legislature (Laws of 1871, chap. 365), amended by statutes passed in the years 1880 (Chap. 228), 1881 (Chap. 113) and 1883 (Chap. 59). The purposes of the corporation, declared in the act, were 'To provide, regulate and maintain a suitable building, room or rooms, for a cotton exchange in the City of New York; to adjust controversies between its members; to establish just and equitable principles in the trade; to maintain uniformity in its rules, regulations and usages; to adopt standards of classifications; to acquire, preserve and disseminate useful information connected with the cotton interest throughout all markets; to decrease the local risks attendant upon the business, and generally to promote the cotton trade of the city of New York, increase its amount and augment the facilities with which it may be conducted.'"

At pages 116, 117:

> "That both the parties contemplated that the transactions should take place upon the Cotton Exchange and were to be controlled by its rules and customs, is not susceptible of argument. The defendant, who, upon his own testimony, has been engaged in doing business through members of the Cotton Exchange upon that exchange for from fifteen to twenty years, and who, the testimony shows, has taken his profits from time to time without objection, for the purpose of avoiding this liability, now testifies that his purpose was 'to play the market', and that he did not

intend either to deliver or receive a pound of the cotton which he ordered the plaintiffs to buy and sell upon the exchange for his account.

"If we assume that such testimony, given under such circumstances, is credible, that would not be ground for declaring the transactions illegal. *Bibb* vs. *Allen*, (149 U. S., 481) was an action for commissions for services rendered and money paid and advanced by plaintiffs for and at the request of the defendants in selling for their account and as their agents cotton for future delivery according to the rules and regulations of the New York Cotton Exchange. The court reasserted the proposition that it is well settled that contracts for the future delivery of merchandise or tangible property are not void, whether such property is in existence in the hands of the seller or to be subsequently acquired, and that the burden of proof is upon the party who seeks to impeach such transactions by showing affirmatively their illegality; that a transaction which on its face is legitimate cannot be held void as a wagering contract by showing that one party only so understood and meant it to be; and in sustaining a judgment for the plaintiffs alluded to the fact that in the memorandum or slip contracts the sales were described as made subject to the rules and regulations of the New York Cotton Exchange; that the parties made use in their telegraphic correspondence of Shepperson's code, and said: 'It is shown that the rules and regulations of the New York Cotton Exchange recognized no contracts except for the sale and purchase of cotton to be actually delivered. These rules and regulations impose upon the seller the obligation to deliver the cotton sold, and upon the purchaser the obligation to receive it. * * These rules which were authorized to be made by the statute of the State

of New York, under which the Exchange was incorporated, enter into and form part of the contracts of sale in this case.' "

At page 119:

"The very purpose of an exchange is to facilitate business, and as the growth of commercial and banking business has necessitated the economy of the banking clearing house, so the stock exchange and the cotton exchange have adopted clearing house facilities. A broker upon the exchange may represent many customers, and may execute during the day with many other members many contracts both of sale and purchase. It would be as idle to insist upon an actual delivery between the members of the Exchange as it would be to compel the banks to cart to each other's banking house the actual money called for by the checks severally received by each upon the other. So that the rules of the Exchange provide for certain methods of clearing. It will be remembered that each transaction occurs across the ring and is evidenced by a so-called slip, which is in effect a bought and sold note or, in the vernacular of the Exchange, 'a contract' which provides for actual delivery. The first method of clearance is by direct settlement, that is, if A has sold to B and B has sold to A, the two contracts are offset one against the other. If there is a difference in the price, that difference is paid. *Second*, the ring settlement, which consists of three or more transactions which may be offset, and, by payment of differences, lead to the same result. By this offset there is a substitution through the chain or ring of parties. Another method is called the 'street let-out', which is simply another method of arriving at a novation or sub stitution."

At page 122:

"Bearing in mind, then, that the dealings between the plaintiffs and the defendant had reference to and were to be consummated upon the exchange with reference to and controlled by the by-laws, rules and regulations thereof, which governed the plaintiffs as members thereof, and that those rules and regulations contemplated and required actual performance of the contracts for future delivery, and, as between members, provided for clearances by prescribed methods which could be compelled by any member, and that these methods have been approved by the Supreme Court of the United States—holding that a settlement by way of set-off is equivalent to delivery, and that the defendant does not complain that his directions were not carried out, and that he did not receive prompt notice of the sale or purchase, as ordered by him, at the prices reported at the time made, and that he made no question of the accounts received until this suit was brought, what is it that he complains of? That because the contracts which were purchased or sold for his account were settled by way of substitution and set-off between the plaintiffs and other members of the Exchange before the time when he gave his order to close the transaction. therefore, no moneys had been laid out and expended for his benefit. But for every contract that was set off against another contract there was a payment *pro tanto*, because set-off is payment, and where the prices named in the contract differed an actual payment in money took place. So that the effect, so far as the plaintiffs were concerned, was precisely as if when he did order the transaction closed they had paid out the actual sum which represented the difference between the purchase and the selling price. No harm

came to him by reason of this transaction. The only persons that he ever knew were the plaintiffs; it was upon their faith and credit that he rested when he gave his orders. They never reported to him the names of the persons with whom they had entered into the contract which he had authorized them to make, either the opposite broker or the principals of that broker. He dealt with the plaintiffs, and the rules required that whenever the substitution and set-off occurred they should be responsible for the strict fulfillment of the contract and be liable to the defendant."

Cleage vs. *Laidley et al.*, 149 Fed. Rep., 346, involved the validity of transactions in grain futures on the St. Louis and Chicago Exchanges.

By SANBORN, *J.*, at page 352:

"Contracts for the future delivery of grain and other personal property are lawful and valid. The legal presumption is that the parties who make them intend to perform them, and the burden is on him who avers that the illegal intention of one or more of these parties has made them void to establish his allegation by plenary proof. *Clews* vs. *Jamieson*, 182 U. S., 461, 489, 21 Sup. Ct., 845, 45 L. Ed., 1183; *Pixley* vs. *Boynton*, 79 Ill., 351. An intention by one or both of the parties to sell such an agreement, or their rights under it, before the time of delivery, does not avoid it. Parties have the same right to buy contracts for the future delivery of personal property with the intention of selling them that they have to buy the property with such an intention. *Ponder* vs. *Jerome Hill Cotton Co.*, 40 C. C. A., 416, 420; 100 Fed., 373, 377. An intention to discharge a contract for the future delivery of personal

property by set-off or by ringing off under the rules and practice of the Board of Trade and by the payment of differences is not illegal, and does not render the agreement void. The contracts which form the foundation of the claims of the brokers which are here in question were made and ratified by the defendant. They were legal contracts per se. There was no evidence that either the defendant or the brokers intended to settle them without the delivery of any grain by the payment to, or receipt from the other parties to the agreements of the difference between the contract prices and the market prices at the times of performance. The intention not to receive grain unless forced to do so to protect his contracts to which the defendant testified is consonant with the lawful intention to sell like quantities of grain and to settle his obligations as far as possible by set-offs and by the use of rings, so that he would be obligated to receive but little or none of the commodities. From the lawful contracts the legal presumption arose that the parties thereto intended in good faith to perform them."

POINT III.

The Government's charge that no economic cause existed for the advance in sugar prices was disproved.

The Bill alleges (R., p. 19):

> "There existed during this period no economic justification for a sudden or appreciable increase in the price of raw or refined sugar, or for any increase."

The answer of the defendants, the affidavit of Mr. Gilmour (R., p. 95), and the affidavit of Mr. Diercks (R., pp. 67, 74), show beyond any question that there were most substantial economic reasons for price increases.

These reasons are:

1. Development in trade conditions showing that the estimated excess of production over consumption was approaching the vanishing point. Emphasized by

   a. The U. S. Department of Commerce's announcement on or about February 10th, 1923, that there would be a shortage of production (R., pp. 54, 74, 137-138).

   b. The similar announcement by the British Chancellor of the Exchequer on April 18th, 1923 (R., p. 75).

   c. The reduction in the estimates of various recognized statistical authorities of the Cuban crop (R., p. 53, fols. 62, 236).

   d. A drought in Cuba (R., p. 96, fol. 147).

2. The fact that the existing estimates of production and consumption showed a margin for the world's supply of production over consumption of only 226,000 tons,—less than the world's consumption needs for four days—a margin which might be readily wiped out by weather conditions, and so slight as to justify grave apprehension of the sufficiency of the world's available supply for the world's needs (R., p. 57, fol. 73).

We know of no more satisfactory reasons for advancing prices.

The Government in its brief (p. 85) refers to "the leap of $1.00 per hundred pounds in the

price of all futures, and of 99¢ per hundred on spot sugar" occasioned by the advance publication on February 10th of the Government's sugar crop estimate made by the Department of Commerce. The Government's brief shows, by quotations from testimony taken before the Massachusetts Commission, exactly how such sudden advance came about (Appellant's Brief, pp. 107, 109, 110):

> "On February 9th the Department of Commerce released for use not earlier than February 12th, a summary of an article on Sugar Production and Consumption, to be published in the Commerce Reports issued February 12th, 1923. * * * This story was featured in the press in sensational headlines as early as the morning of February 10th. * * * The public had the opportunity over the week end of February 10th and the holiday of February 12th, to digest both of these alarming reports (p. 109). * * * The advance is directly attributable to the misleading statement issued by the United States Department of Commerce indicating a decided scarcity of sugar throughout the world and which was followed this morning by a reduction of the Cuban crop estimates by Messrs. Guma-Mejer of Havana * * *" (p. 110).

The Government, in effect conceding that the immediate cause of the sudden rise in prices was this misleading report of the Department of Commerce, says (p. 112):

> "There would have been no agitation if there had been no Exchange, or if it had been properly and legally organized; and no abnormal rise in prices would have resulted."

The Government might have said more accurately that there would have been no agitation *if there had been no sugar,* or *if there had been no Department of Commerce,* or *if it had been properly conducted.* Obviously, the "spot" market would have been agitated by what happened, even if there had been no Exchange. The Government's announcement, at a time when refiners and distributors had low stocks on hand, led to a scramble to accumulate supplies, and caused a near panic.

The Bill (R., p. 17), alleges:

> "The United States Department of Commerce estimates the 1922-23 world production of sugar at 19,511,000 tons, an increase of 1,800,000 tons over 1921-22."

This statement is only 1,203,000 tons out of the way. The United States Department of Commerce, in its publication of February 12, 1923, as shown by the copy annexed to the affidavit of Mr. Diercks (R., p. 80), estimated the world's production of sugar for 1922-23 at 18,308,000, and not 19,511,000. The Bill's conclusions are, we believe, as inaccurate as its statement of facts.

The Bill itself shows that the margin of safety of available supplies over the world's demand is relatively small on the basis of an estimated Cuban crop of 4,000,000 tons. Two of the four leading statisticians have reduced this estimate by over one-quarter of a million tons, so that on their figures the true statistical estimated surplus is less than four days' world supply (Answer, R., page 57).

The economic reasons for advancing prices are, we submit, conclusively established.

POINT IV.

Grave results would follow a forced closing of the Exchange and the Government's purpose would undoubtedly be defeated thereby.

The Bill charges and the answer admits that the Exchange "is the largest commercial center for transactions relating to sugar in the world," and that its quotations "are taken by those who own and sell sugar and those who purchase sugar as the basis for prices in actual transactions."

In other words, all the transactions in sugar in the United States are alleged to be based on the Exchange's quoted prices for futures. The Court below was asked by one fell stroke to wipe out this universal basis of trading and substitute nothing for it—except ignorance of market trends, speculation, guesses and immediate local conditions. Instead of lower prices, the probability is that any such drastic act would tend to raise prices, and, by removing the barometer which tells the trade at large of the conditions in the trade and the trend of future prices, lead to violent and disastrous fluctuations of price with all the evil effects attendant thereon.

In this Court, the Government asks, as an alternative, that, by decree, this Court shall impose on the Sugar Exchange regulations similar to those imposed by Congress on the Chicago Board of Trade. It is enough to say in answer that that is a legislative and not a judicial function.

At page 121 of its Brief, the Government ingenuously says:

"Apparently it is a simple problem for

> raw sugar, which is manufactured in different places during certain periods of the year, to find a purchaser among the sixteen refineries, and a simple problem for these refineries to pass the refined sugar on to the wholesaler * * *. There was no Sugar Exchange in existence in this country prior to December, 1914, and its activities were suspended from August, 1917, to February, 1920, and consequently its operation has extended over a period of only five or six years. Therefore, it certainly cannot be insisted with reason that its existence is essential to the distribution of sugar in the United States."

The Government is right in thinking that it is "a simple problem" for raw sugar growers to sell to only sixteen refineries owned by ten (10) companies (Appellant's Brief, p. 20). It is a still "simpler problem" for them to sell to only a single purchaser; but it is fairly obvious that with only a single purchaser, or only ten purchasers, the market for raw sugar would not be established by the free competition which the Sherman Act was intended to promote. The fewer the transactions in sugar, the greater certainty that the price will be controlled. Similarly, it is a simple matter for the relatively few Cuban growers of sugar to enhance the price of sugar, if there is not a free market and if transactions are so few that they can be controlled. Part of the usefulness of the Exchange is in preventing invisible combinations between a few refiners, on the one hand, or between a relatively small number of growers of raw sugar, on the other.

It is true that the United States existed without an Exchange for a great many years. It is equally true that it existed without railroads for many years; without telephones or telegrams for

many years; without gas or electricity or even friction matches for many years; but there is no reason for abolishing these convenient modern inventions. There was, if we mistake not, even a time when the United States was without a Sherman Act, or advance crop reports from a Department of Commerce.

POINT V.

The recent decision of the Supreme Court in the Grain Futures Act case is no precedent for the present suit.

In the recent case of the Board of Trade of the City of Chicago against Olsen, and others, argued at the last October term and decided on April 16, 1923, this Court upheld the validity of the Grain Futures Act (against an attack that it was invalid for the reason that interstate commerce was not affected), on the ground that the act evidenced a conclusion of Congress that manipulation or speculation on the grain future market might interfere with interstate commerce and that the grain future market, being a public utility, was therefore a legitimate object of regulation by Congress.

In other words, Congress by passing, and this Court by sustaining the Act, recognized that the opportunities afforded by the Board of Trade for future trading in wheat, and the effect thereof on the trade, made the Board of Trade a public utility and a fit object of regulation like any other public utility affecting interstate commerce. Neither Congress nor this Court under-

took to destroy the Board of Trade. But in this case the Government has sought by Court action to destroy the Sugar Exchange—apparently on the curious theory that, since Congress has the right to regulate the Exchange to prevent manipulation, the Courts without any evidence of manipulation should destroy it. It is as sensible to say that because railroad managements of the country have at times been guilty of abuses all railroads should be destroyed.

POINT VI.

No facts showing concerted action or collusion on the part of the defendants to enhance prices or curtail production or restrain trade are shown.

The learned Assistant Attorney General conceded on the argument below that there was no corner, but asserted that the Exchange had been used "by a small group of men" to enhance prices; but no facts were pleaded to connect the small group of men referred to with the defendants in this action. If, as the learned Assistant Attorney General stated below in his oral argument, the evil that he complained of had been brought about by a small group of men improperly using the Exchange, the Bill should have been directed against such small group of men and not against the actual defendants.

If the bill had been directed against a small group of men who had agreed to bid higher and higher prices for sugar, in the hope of raising the price level and then "unloading" at a profit,

a fairly simple situation would be presented for discussion and adjudication. But the Bill makes no such allegation. It does not attempt to point out which, if any, members of the Exchange are parties to any such agreement. It is not shown that the entire membership of the Exchange is engaged in any such conspiracy. On the contrary, the situation developed by the record clearly negatives any such general conspiracy. The members of the Exchange are for the most part brokers who execute orders for other persons and the Exchange furnishes facilities for the whole world, not only to buy but also to sell. It is not claimed that any of the transactions on the Exchange are "wash" sales. The individual defendants expressly deny making "wash" sales (R., pp. 82, 83). Therefore, every *purchase* made on the Exchange involved a *sale* as well. For every individual who bought at a high price, hoping that prices would go higher and (if he was a speculator, as charged) intending to force prices higher, there was a seller, who was either indifferent to the subsequent course of prices, if he was not a speculator, or who hoped or intended that prices would go lower, if he was a speculator who intended to buy back his contract at a profit at some later date.

The Government makes no attempt to point out which defendants, if any, were trying to raise prices. The facts contained in the Government's case are equally consistent with the hypothesis that the Exchange, by furnishing a free market for sellers, furnished a very real protection to the public against the alleged conspiracy of those few unnamed wicked men to effect an exorbitant increase in sugar prices.

That indeed is the very purpose and function of an exchange. It arrays the entire force of the

general public's wealth and economic foresight against artificial manipulation. If it furnishes an arena for the activities of speculators, it equally directs against them those means of public defense which are most effective because most consonant with economic law.

For this reason, moreover, a Bill under the Sherman Act, when directed against an exchange needs to be more specific in its charges of "concert" than if it were directed against an association of manufacturers or of dealers, where every member's interest or hope of profit coincides with every other members;—where they are all on the same side of the market instead of trading against one another.

The Government largely relies on *American Column Co.* vs. *United States,* 257 U. S., 377, the so-called *Hardwood Trust* case. The majority opinion in that case concluded as follows (italics ours):

> "Convinced, as we are, that the purpose and effect of the activities of the 'Open Competition Plan', here under discussion, were *to restrict competition* and thereby restrain interstate commerce in the manufacture and sale of hardwood lumber by concerted action in *curtailing production and in increasing prices,* we agree with the District Court that it constituted a combination and conspiracy in restraint of interstate commerce within the meaning of the Anti-Trust Act of 1890."

It will be noted that in that case this Court held that the action complained of *curtailed production* and *restricted competition* as well as increased prices. It is not alleged that the Exchange or the Clearing Association or their officers or directors curtailed production or restricted com-

petition, and it is a mere conclusion of the pleader that anything that they did increased prices.

The members of the Exchange are for the most part brokers who execute orders sent them by their principals from over twenty different countries of the world (Diercks' affidavit, R., p. 68). *The prices for futures on the Exchange have not advanced more rapidly than the prices for spot deliveries and the prices made by refiners for refined sugar. Indeed, the advances in futures have been less than, or intermediate between, the other two, showing the stabilizing effect of the future trading.* (Diercks' affidavit, R., p. 77).

In this connection it is interesting to note that the Tariff Commission, asked by the President of the United States on March 27th of this year, to investigate and report on the relation of the sugar tariff to the high prices for sugar, did not ascribe such high prices to the defendants in this case. In substance, the Commission reported (Diercks' affidavit, R., page 78),

> "that the tariff on sugar was not the cause of the advance but was only one factor in an equation with numerous variables, and that even in normal times numerous factors tend to affect prices of sugar in the United States, to wit (*a*) the present and anticipated demand of all the countries of the world; (*b*) the present stocks and anticipated production of all producing countries; (*c*) the general credit situation; (*d*) the present and anticipated prices of substitute or derivative products; (*e*) the fluctuations in foreign exchanges; (*f*) the changes in tariff rates here and abroad, and other factors."

Had the Tariff Commission agreed with the

Department of Justice that the high prices were due, even in part, to these defendants, it would certainly have expressly said so.

POINT VII.

The decree below should be affirmed.

Respectfully submitted,

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JOHN W. DAVIS,
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Of Counsel.

Nov. 3rd, 1923.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA, APPELLANT,
v.
NEW YORK COFFEE & SUGAR EXCHANGE (Inc.), New York Coffee & Sugar Clearing Association (Inc.), et al. } No. 331.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR THE UNITED STATES.

The United States desires to reply very briefly to certain of the more relevant contentions of the appellees.

I.

The contention that there is neither allegation nor proof of a combination or conspiracy among the defendants.

(1) Appellees find it convenient to interpret the case as charging merely a combination or conspiracy to enhance the price of sugar by "rigging" the market in February, 1923, and then complain that the case is not solely directed at those responsible for the "rigging" operations.

This attempted substitution of an incident for the case is neither warranted by the bill, the position of

the Government in the District Court, the assignments of error, nor the contentions of the Government in this Court.

We are not alleging a conspiracy to increase or reduce prices or a conspiracy to control the production or price of sugar. The Exchange itself is the tool of the conspirators; its maintenance and operation to fix the price of sugar is the conspiracy.

Neither are we concerned with the fact that natural causes do affect the price of sugar and do affect the price registered for sugar on this Exchange. But natural causes are not the only causes which affect and contribute to the fixing of these prices. The Exchange is the artificial means by which the price of sugar is fixed and commerce therein is restrained.

The plain allegations of the bill are that the defendants have created and are maintaining an instrumentality for the artificial control of prices in a commodity which is normally a subject of both interstate and foreign commerce; that such instrumentality plays no necessary or useful part in the *actual* marketing of sugar from the producers to the refiners and from the refiners to the consumers; that the operations of the defendants by and through said instrumentality do, however, affect directly the prices to be observed in the actual marketing of sugar; that for a period of more than two months prior to the filing of the bill said control was exercised to increase prices to a level not warranted by the laws of supply and demand; that the individual

defendants, through the instrumentality of the corporation defendants, had brought about the result of a course of conduct which had nothing to do with the orderly marketing of sugar; and that operation of the defendants giving rise to such artificially inflated prices were not only unlawful and reprehensible *per se*, but were abnormal and unprecedented in the history of defendants' peculiar activities.

The case is directed at the creation, maintenance, and operation of the Exchange and Clearing Association. The theory of the case is that operations on the Exchange are subject to "constantly recurring abuses" which are a "burden and obstruction," and, consequently, a "restraint" upon interstate and foreign commerce. The case is aimed at the whole business of the Exchange; although the Government would except from the decree the relatively small proportion of that business consisting of bona fide sales of sugar and legitimate hedging contracts. The defendants are the Exchange and Clearing Association and all the officers and members thereof. These defendants, acting in concert, are solely responsible for the condition of which the Government complains. It must be, therefore, that they are engaged in a combination or conspiracy within the meaning of the Sherman Law.

(2) While appellees admit that the words "combination" and "conspiracy" are liberally sprinkled through the bill, it is said that these are mere conclusions and not allegations of fact. It is to be

regretted that appellees have not enlarged upon this theme. Presumably it is their contention that the allegations that defendants "have been and are engaged in a combination and conspiracy" and that the acts complained of "constitute and are a combination and conspiracy" are not the equivalents of a charge that "the defendants have combined and conspired." Such a contention ignores the wording of the statute and overlooks the answer of this Court to a similar contention made in the *Swift case*, 196 U. S. 375, in which it was said:

> Whatever may be thought concerning the proper construction of the statute, a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech.

(3) No motion to dismiss was interposed, but an answer was filed admitting in substance the important allegations of the bill, the principal traverse being as to the economic justification for the sudden increase in prices in February. In addition, the charters, by-laws, and trading rules of the Exchange and Clearing Association are all in evidence. The adoption and observance of these imply and require the concurrence, i. e., concert of action, of all the defendants. These, it is submitted, constitute abundant evidence of the combination and conspiracy complained of in the bill.

It is, of course, perfectly well settled that in order to establish a combination or conspiracy it is not necessary to allege or prove an express agreement. If the effect of what the defendants have done is to restrain trade, the conspiracy will be inferred. In *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600, 612, it was said:

> But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, and when, in this case, by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.

Another way of stating the proposition is in the language of this Court in *United States* v. *Patten*, 226 U. S. 525, 543:

> And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and can not be heard to say the contrary. In other words, by purposely engag-

ing in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent they are, in legal contemplation, chargeable with intending that result.

Also see:

Regina v. *Murphy*, 8 C. & P. 297, 404.
Com. v. *McLean*, 2 Pars. (Pa.) 367, 388.
Patnode v. *Westenhaver*, 114 Wis. 460.
United States v. *Sacia*, 2 Fed. 754.
Reilly v. *United States*, 106 Fed. 896.

II.

The contention that there is neither allegation nor proof of restraint of trade.

(1) Let us repeat that the *gravamen* of the bill is artificial control of prices. The Government accepts and bottoms its case upon the finding of this Court in *Board of Trade* v. *Olson*, No. 701, Oct. Term, 1922, that "the question of price dominates trade between the States" and that "manipulations of * * * futures for speculative profit, though not carried to the extent of a corner or complete monopoly, exert a vicious influence and produce abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand and * * * disturb the normal flow of actual consignments." We say, with this Court, that "sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it."

Appellees, in deference to the findings upon which the Grain Futures Act was sustained, apparently

concede that operations on the Exchange "are an obstruction to and a burden upon interstate commerce." (Br. p. 10.) Any attempted distinction between the terms "obstruction" and "burden" on the one hand and "restraint" upon the other must collide with the decision of this Court in the *Standard Oil Case*, 221 U. S. 1, 54, in which the origin of the latter is traced and its meaning expounded:

> And by operation of the mental process which led to considering as a monopoly acts which although they did not constitute a monopoly were thought to produce some of its baneful effects, so also because of the *impediment* or *burden* to the due course of trade which they produced such acts came to be referred to as in restraint of trade.

And in the *United States* v. *Patten*, 226 U. S. 525, 543, it is said:

> Bearing in mind that such was the nature, object, and scope of the conspiracy, we regard it as altogether plain that by its necessary operation it would directly and materially *impede* and *burden* the due course of trade and commerce among the States and therefore inflict upon the public the injuries which the Anti-Trust Act is designed to prevent.

It has often been held that a physical obstruction to the movement of interstate commerce constitutes a restraint thereof within the meaning of the Sherman Law. *In re Debs*, 158 U. S. 564, affirming 64 Fed. 724; *Steers* v. *United States*, 192 Fed. 1; *United States* v. *Railway Employees Dept.*, 283 Fed. 479.

The terms are synomymous and are used interchangeably. Thus in *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600, 613, this Court, in disposing of a contention similar to one made in this case, said:

> The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly *restrain* competition or unduly *obstruct* the free flow of such commerce, and private choice of means must yield to the national authority thus exerted.

(2) In *American Column & Lumber Co.* v. *United States*, 257 U. S. 377, the injunction against the American Hardwood Manufacturers' Association was sustained on the ground that that organization constituted a combination to restrain trade by unduly enhancing prices. As pointed out in the dissenting opinion "there was at no time uniformity in prices" (p. 417). The maintenance of abnormally high price levels was the gist of the offending against the Sherman Law. The Court said (p. 409):

> These quotations (from the correspondence of the members) are sufficient to show beyond discussion that the purpose of the organization and especially of the frequent meetings was to bring about *a concerted effort to raise prices regardless of cost or merit, and so was*

> *unlawful.* * * * Without going into detail the *record shows that the prices of the grades of hardwood in most general use were increased to an unprecedented extent* during the year. * * * We can not but agree with the members of the "Plan" themselves and with the District Court in the conclusion that the united action of this large and influential membership of dealers contribute greatly to this *extraordinary price increase.*

Commenting on the action of the defendants in compiling reports of their business operations for circulation among their competitors, the Court said (p. 410):

> This is not the conduct of competitors but is so clearly that of men united in an agreement, express or implied, to act together and pursue a common purpose under a common guide that, if it did not stand confessed *a combination to restrict production and increase prices in interstate commerce* and as, *therefore, a direct restraint upon that commerce,* as we have seen that it is, that conclusion must inevitably have been inferred from the facts which were proved.

To the same effect is the recent decision in the *Linseed Oil Case.*

(3) Although in view of the foregoing it would seem to be sheer supererogation, it is nevertheless worthy of note that the bill twice alleges that the effect of the artificial price manipulation by and through the instrumentality is directly to affect interstate trade and commerce by decreasing the

volume of sugar moving therein (R. 24, 25); and that there is an abundance of affirmative proof that said operations actually have had that effect (R. 123, 127, 129, 130, 313).

III.

The contention that the practices complained of can not be reached under the Sherman Law and that additional findings and legislation are necessary.

It is true that this precise question has not heretofore been raised under the Sherman Law. But in *United States* v. *American Tobacco Co.*, 221 U. S. 106, 175, 181, there was no hesitancy in giving to that statute "a more comprehensive application than has been affixed to it in any previous decision" where facts involved "questions as to the operation of the Anti-Trust Act not hitherto presented in any case"; and this for the reason that the statute "embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed," and "in view of the general language of the statute and the public policy which it manifested there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by indirection the prohibitions of the statute."

The Sherman Law is all-embracing in its terms and adequate to any situation which involves a direct or substantial restraint upon the commerce of the United States. And in giving effect to the policy

which the law establishes, the courts are invested with full power to remove the prohibited restraint, whatever the means by which it is accomplished. As said in *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 438–439:

> The court's protective and restraining powers extend to every device whereby property is irreparably damaged or commerce is illegally restrained. To hold that the restraint of trade under the Sherman antitrust act, or on general principles of law, could be enjoined, but that the means through which the restraint was accomplished could not be enjoined, would be to render the law impotent.

In the *Olsen Case* this Court sustained the Grain Futures Act upon the very ground that the operations of the Board of Trade resulted in obstructions to and restraints upon interstate commerce which are contrary to and violative of the Sherman Law. Evidence of such direct connection with and effect upon interstate commerce was deemed essential to the validity of the Act. The mere fact that Congress has seen fit to impose particular regulations governing transactions in grain futures can not mean that like transactions in sugar futures, which directly obstruct and restrain interstate commerce in sugar, are not within the scope of the Sherman Law. If that were true, we would be confronted with the following absurdity: (a) That in order to sustain a particular regulation of a given business it must be shown that the evils to be remedied are the same as those at which the Sherman Law is aimed; (b) and

that such regulation having been imposed, the Sherman Law can never be invoked to correct like evils in a somewhat similar business, but resort must be had to Congress and legislation enacted upon the same premise, namely, that the situation to be remedied is contrary to a law already on the statute books.

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